U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 16-0035 BLA
and 16-0036 BLA

GENEVA F. WILLS (o/b/o/ and Widow of EDDIE R. WILLS) Claimant-Respondent v. CONSOLIDATION COAL COMPANY and CONSOL ENERGY INCORPORATED Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/09/2017 DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

George E. Roeder, III (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand Awarding Benefits (2013-BLA-5360 and 2013-BLA-5409) of Administrative Law Judge Drew A. Swank, rendered on a miner's subsequent claim filed on June 16, 2010, and a survivor's claim filed on September 10, 2012, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for the second time.[1]

With respect to the miner's claim, the Board previously affirmed the administrative law judge's finding that the miner had at least fifteen years of underground coal mine employment. *Wills v. Consolidation Coal Co.*, BRB Nos. 14-0154 BLA and 14-0155 BLA, slip op. at 4-5 (Jan. 28, 2015) (unpub.). However, the Board vacated the administrative law judge's finding that the miner had a totally disabling respiratory or pulmonary impairment, as the administrative law judge did not adequately explain the weight he accorded to the pulmonary function studies and medical opinions. *Id*. at 5-8. Thus, the Board vacated the administrative law judge's determination that claimant invoked the rebuttable presumption that the miner was totally disabled due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.[2] *Id*. at 8. In addition, the Board held that the administrative law judge erred in failing to consider all the relevant evidence on the existence of clinical pneumoconiosis, prior to concluding that employer failed to establish rebuttal of the Section 411(c)(4) presumption.[3] *Id*. at 9-11. The Board therefore vacated the award of benefits and remanded the case for further consideration. *Id.* at 11.

Because the Board vacated the administrative law judge's award of benefits in the miner's claim, the Board vacated the administrative law judge's determination that

[1] We incorporate the procedural history of the case as set forth in the Board's prior decision. *See Wills v. Consolidation Coal Co.*, BRB Nos. 14-0154 BLA and 14-0155 BLA, slip op. at 2 nn.1-2 (Jan. 28, 2015) (unpub.).

[2] Relevant to the miner's claim, Section 411(c)(4) provides a rebuttable presumption that the miner was totally disabled due to pneumoconiosis if claimant establishes that the miner had at least fifteen years of underground coal mine employment, or employment in conditions substantially similar to those in an underground mine, and also suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

[3] The Board instructed the administrative law judge on remand to weigh the analog and digital x-rays, the CT scans, and medical opinion evidence in determining whether employer disproved the existence of pneumoconiosis. *Wills*, slip op. at 10.

claimant is entitled to derivative benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*).[4] *Id*.

On remand, the administrative law judge again found that the miner had a totally disabling respiratory or pulmonary impairment and that claimant thereby invoked the Section 411(c)(4) presumption in the miner's claim. The administrative law judge also found that employer failed to rebut the presumption. Having awarded benefits in the miner's claim, the administrative law judge determined that claimant was derivatively entitled to survivor's benefits pursuant to Section 422(*l*).

On appeal, employer contends that the administrative law judge erred in finding that claimant established total disability for invocation of the Section 411(c)(4) presumption in the miner's claim, and in finding that employer failed to rebut the presumption. Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. Invocation of the Section 411(c)(4) Presumption – Total Disability

On remand, the administrative law judge reconsidered the three newly submitted pulmonary function studies dated December 14, 2010, April 7, 2011, and November 16, 2011. Decision and Order on Remand at 6. The December 14, 2010 pulmonary function study by Dr. Rasmussen had qualifying values for total disability,[6] before and after

[4] Under Section 422(*l*) of the Act, the survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012).

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner's last coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 4, 7.

[6] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values in Appendix B of 20 C.F.R. Part 718. A "non-

administration of a bronchodilator. Miner's Claim (MC) Director's Exhibit 11. The April 7, 2011 study by Dr. Fino was qualifying for total disability and no bronchodilator was administered. MC Director's Exhibit 35. The November 16, 2011 study by Dr. Basheda was non-qualifying before the use of a bronchodilator, but had qualifying values for total disability after administration of a bronchodilator. *Id.*

In determining the weight to accord the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i), the administrative law judge credited Dr. Basheda's explanation that the November 16, 2011 qualifying post-bronchodilator study was unreliable due to poor effort. Decision and Order on Remand at 7; MC Director's Exhibit 35. Although the administering technician indicated that the miner gave "good effort" on this study, the administrative law judge stated that he credited Dr. Basheda's opinion regarding the validity of the study because the record established that Dr. Basheda is Board-certified in internal medicine with a subspecialty in pulmonary disease, "while the technician's credentials are unknown and almost certainly do not equal those of Dr. Basheda." Decision and Order on Remand at 7. The administrative law judge explained that the November 16, 2011 pre-bronchodilator pulmonary function study provided "the best representation of the miner's pulmonary condition and thus merit[ed] the most weight because *pneumoconiosis is a latent and progressive disease that does not improve over time*." *Id.* Observing that it was a "close call," the administrative law judge found that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i). *Id.*

Next, the administrative law judge explained the weight he accorded the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), as follows:

> After considering all of the medical opinion evidence, the undersigned finds that [claimant] has established that [the miner was] totally disabled from a respiratory or pulmonary standpoint. All three opining physicians understood the exertional requirements of the miner's last coal mining job and thus could offer a credible opinion as to whether the miner could return to that job or comparable employment. Two of the three physicians - Drs. Rasmussen and Fino - concluded that the miner [was] totally disabled from a respiratory or pulmonary standpoint. Only Dr. Basheda found that the miner [did] not have a totally disabling respiratory or pulmonary [impairment]. Notably, Dr. Fino was hired by

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qualifying" study yields values that exceed those in the tables. *See* 20 C.F.R. §718.204(b)(2)(i).

> [e]mployer in this claim, yet he repeatedly stated in his initial report, deposition, and supplemental report that the miner ha[d] a totally disabling respiratory or pulmonary impairment. Given that two physicians concluded that the miner [was] totally disabled from a respiratory or pulmonary standpoint - including one of the [e]mployer's own doctors - and only one physician found that he was not, the undersigned finds that [claimant] has established a total pulmonary or respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Decision and Order on Remand at 10.

Employer contends that the administrative law judge erred in stating that his finding with respect to the pulmonary function study evidence was "superfluous" to his findings with regard to the medical opinion evidence.[7] Employer's Brief in Support of Petition for Review at 11, *quoting* Decision and Order on Remand at 7 n.10. Employer asserts that Dr. Fino failed to explain why the miner should be considered totally disabled in light of the most recent non-qualifying pulmonary function study credited by the administrative law judge. Employer argues that the administrative law judge also failed to properly consider that Dr. Fino provided "a neurological explanation for the [m]iner's total disability, not a pulmonary or respiratory cause." Employer's Brief in Support of Petition for Review at 13. Employer also contends that the administrative law judge erred in crediting Dr. Fino's opinion because he was hired by employer and did not properly address whether either Dr. Rasmussen or Dr. Fino provided a reasoned and documented opinion to establish total disability. Thus, employer requests that the Board vacate the administrative law judge's finding under 20 C.F.R. §718.204(b)(2)(iv). Alternatively, employer maintains that if the Board affirms the administrative law judge's findings with respect to the medical opinion evidence, the case should be remanded for the administrative law judge to explain the weight he accorded the contrary probative evidence. Employer's assertions of error have merit, in part.

Contrary to employer's contention, the fact that claimant was unable to establish total disability based on pulmonary function study evidence does not preclude a finding of total disability based on the medical opinion evidence. *See* 20 C.F.R. §718.204(b)(2)(iv).[8] Non-qualifying test results alone do not establish the absence of an

[7] The administrative law judge noted that his finding that claimant was unable to establish total disability based on the pulmonary function studies was "ultimately superfluous" given his determination that claimant established total disability based on the medical opinion evidence. Decision and Order on Remand at 8, n. 10.

[8] The regulation at 20 C.F.R. §718.204(b)(2)(iv) specifically states:

impairment. *Estep v. Director, OWCP*, 7 BLR 1-904, 1-905 (1985). A physician may conclude that the miner is totally disabled despite non-qualifying pulmonary function tests. The relevant inquiry at 20 C.F.R. §718.204(b)(2)(iv) is whether the miner's respiratory or pulmonary impairment precluded the performance of his usual coal mine work. See 20 C.F.R. §718.204(b)(1)(i), (2)(iv).

Furthermore, we reject employer's argument that Dr. Fino's opinion does not support a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv) because Dr. Fino attributed the miner's disabling respiratory or pulmonary impairment to an elevated diaphragm and underlying neurological disease. The etiology of the miner's respiratory or pulmonary impairment relates to the issue of total disability causation, which is addressed at 20 C.F.R. §718.204(c), or in consideration of whether employer is able to successfully rebut the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.305(d)(i), (ii); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-699 (4th Cir. 2015).

However, we agree with employer that the administrative law judge erred in failing to render specific findings as to whether the medical opinions of Drs. Rasmussen, Fino,[9] and Basheda are reasoned and documented,[10] and in failing to explain why he

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> Where total disability cannot be shown under paragraphs (b)(2)(i), (ii), or (iii) of this section, or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically accepted clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in [his or her usual coal mine] employment as described in paragraph (b)(1) of this section.

20 C.F.R. §718.204(b)(2)(iv).

[9] We disagree with employer's assertion that the administrative law judge credited Dr. Fino's opinion solely because he was hired by employer. Although the administrative law judge indicated that it was "notable" that Dr. Fino was hired by employer but "repeatedly" diagnosed a totally disabling respiratory or pulmonary impairment, we do not view the administrative law judge's comments as being the reason he credited Dr. Fino's opinion. Decision and Order at 10. Rather, as discussed herein, we hold that the administrative law judge erred by failing to provide any reason for crediting the opinions of Drs. Rasmussen and Fino, over that of Dr. Basheda.

credited the opinions of Drs. Rasmussen and Fino over that of Dr. Basheda. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-235 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). To the extent that the administrative law judge has failed to adequately explain the bases for his findings of fact and conclusions of law in accordance with the Administrative Procedure Act,[11] we must vacate his determination that claimant established total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). Accordingly, we vacate the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption and remand the case for further consideration. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165.

II. Rebuttal of the Section 411(c)(4) Presumption

In the interest of judicial economy, we also address employer's arguments with regard to rebuttal of the Section 411(c)(4) presumption. Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that the miner had neither legal nor clinical pneumoconiosis[12] or that "no part of the miner's respiratory or

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[10] A reasoned opinion is one in which the administrative law judge finds the underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

[11] The Administrative Procedure Act, 5 U.S.C. §500 et seq., as incorporated into the Act by 30 U.S.C. §932(a), requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[12] Clinical pneumoconiosis consists of "those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R §718.201(a)(2). The regulation specifies that "a disease 'arising out of coal mine employment' is any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or

pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see Bender*, 782 F.3d at 137, 25 BLR at 2-699; *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9.

The administrative law judge found that the analog and digital x-ray evidence "slightly favors the miner in establishing the presence of simple, clinical pneumoconiosis," and that the CT scan evidence "slightly favors employer" on the issue of clinical pneumoconiosis. Decision and Order on Remand at 17, 23. The administrative law judge next weighed the medical opinion evidence, combining his analysis of whether employer disproved clinical pneumoconiosis with an analysis of whether employer disproved that the miner's respiratory disability was due to pneumoconiosis. The administrative law judge rejected the opinions of Drs. Fino and Basheda, that the miner did not have clinical pneumoconiosis, as contrary to his findings that the analog and digital x-ray evidence is preponderantly positive for the disease. The administrative law judge also concluded that, in eliminating coal dust exposure as a causative factor for claimant's respiratory impairment, Drs. Fino and Basheda expressed views that were contrary to the regulations. Thus, the administrative law judge concluded that their opinions were insufficient to satisfy employer's burden to establish rebuttal of the Section 411(c)(4) presumption.

At the outset, we agree with employer that the administrative law judge did not perform his rebuttal analysis in the manner set out by the Board in *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring & dissenting).[13] However, there is no merit to employer's contention that the administrative law judge's failure to follow *Minich* requires remand. The administrative law judge's analysis of the issue of disability causation encompassed consideration of the etiology of the miner's disabling restrictive respiratory impairment. The administrative law judge's finding that the opinions of employer's experts are not sufficiently reasoned on that etiology precludes employer from rebutting the presumed facts of legal pneumoconiosis and

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substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[13] In *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring & dissenting), the Board explained that determinations regarding the existence of both legal and clinical pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A), (B), are necessary to provide a framework for the analysis of the credibility of the medical opinions on the issue of disability causation at 20 C.F.R. §718.305(d)(1)(ii).

disability causation. 20 C.F.R. §718.305(d)(1)(i), (ii); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-720-21 (4th Cir. 2015); *Bender*, 782 F.3d at 137; 25 BLR at 2-699; *Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995). As discussed below, we conclude that the administrative law judge acted within his discretion in finding the opinions of Drs. Fino and Basheda insufficient to rebut the Section 411(c)(4) presumption.

The record reflects that Drs. Fino and Basheda each opined that there was insufficient objective evidence to justify a diagnosis of clinical or legal pneumoconiosis. MC Director's Exhibit 35. Dr. Fino diagnosed a disabling restrictive respiratory impairment, which he attributed to several factors, including an elevated right diaphragm, thickening of the pleural lining of the right lung, and underlying neurological disease. MC Director's Exhibit 35 (Dr. Fino's deposition transcript at 11). Dr. Fino testified that he excluded coal dust exposure as a causative factor for the miner's respiratory impairment because the miner had no radiographic evidence of fibrosis and because the miner stopped working in 1985, and "[twenty-one] years went by before he had any complaints of shortness of breath." *Id.* at 14.

Dr. Basheda diagnosed mild restrictive lung disease and reversible airway obstruction caused by bronchial asthma. MC Director's Exhibit 35 (November 16, 2011 report). Dr. Basheda stated that asthma "is not a manifestation of coal dust-induced pulmonary disease" because "obstructive lung disease secondary to coal dust is not found to have a component of reversible airway obstruction on pulmonary function studies, wheezing on examination, or response to bronchodilators or anti-inflammatory therapy" as shown in this case. *Id*. at 26. Dr. Basheda attributed the miner's restrictive lung disease to weight gain, an elevated right diaphragm, atelectasis, and neurologic disease. *Id*. at 27. Dr. Basheda also testified that the miner's airway obstruction, which occurred "[twenty] plus years after leaving the coal mines" is "the opposite of what [one] would expect if this was coal[-]dust induced." MC Director's Exhibit 35 (Dr. Basheda's deposition transcript at 28-29). Dr. Basheda explained that the miner's "obstruction if related to coal dust exposure [should have been] present at the time of his coal mining or at the time of leaving the coal mines, not develop [twenty] years after leaving the coal mines."[14] *Id.*

[14] Dr. Basheda further testified:

> [Pneumoconiosis] can be latent and progressive primarily from an aspect of radiographic findings. Profusion rates can progress as a miner leaves or is removed from the coal mines. You can develop progressive massive fibrosis and respiratory insufficiency, hypoxemic respiratory failure. So when I think of latent and progressive disease I think of those types of

Contrary to employer's contention, we see no error in the administrative law judge's determination that the opinions of Drs. Fino and Basheda are not persuasive because the Department of Labor has recognized that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); Decision and Order on Remand at 22-23. Thus, because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.305(d)(1)(i), (ii); *Bender*, 782 F.3d at 137, 25 BLR at 2-699.

III. Remand Instructions:

On remand, the administrative law judge must reconsider whether the evidence is sufficient to establish that the miner had a totally disabling respiratory or pulmonary impairment. If so, the administrative law judge may reinstate his finding that claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), and reinstate the award of benefits, based on our affirmance of the administrative law judge's finding that employer is unable to rebut the presumption. The administrative law judge may then reinstate his determination that claimant is entitled to derivative benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*).

However, if claimant is unable to establish total disability and invoke the presumption, benefits must be denied on the miner's claim for failure to establish a requisite element of entitlement under 20 C.F.R. Part 718.[15] *Perry v. v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc). Furthermore, if benefits are denied on the miner's

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> features, not the development of some airway obstruction [twenty] some years after leaving the coal mines.

Miner's Claim Director's Exhibit 35 (Dr. Basheda's deposition transcript at 29).

[15] In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Perry v. v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

claim, the administrative law judge must then determine whether claimant is able to establish that the miner suffered from pneumoconiosis, that the miner's pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.203, 718.205(b).

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge